SUPREME COURT, U. S.

JUN 6 1967

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1966

No. [redacted] 223

LEO B. MITTELMAN,

*Petitioner,*

*against*

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO B. MITTELMAN, *pro se,*
124 East 30th Street,
New York, N. Y. 10016.
Tel. No. MU. 9-1114

## INDEX TO BRIEF


| | PAGE |
|---|---|
| The Opinion Below | 1 |
| The Grounds of Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions, Statutes and Rules Involved | 4 |
| Statute and Rules Involved | 5 |
| Statement of Case | 6 |
| A. Introductory | 6 |
| B. Events Leading to Indictment | 7 |
| C. Admissions of Use of Perjury and Suppression: Addressed to Point I | 8 |
| Perjuries of Carroll | 10 |
| The Perjuries of Holland | 11 |
| The Suppressed Evidence | 12 |
| D. The Alleged Perjurious Statement Upon Which Indictment Is Based | 14 |
| E. Facts Relating to Improper References in Indictment to Prior Conviction | 20 |
| F. Facts Relating to Trial Procedure | 20 |
| G. Facts Relating to the Trial Court's Misconception of Materiality Issues | 22 |
| H. Facts Relating to Severance and Prejudicial Joinder | 24 |
| Reasons for Allowing Writ | 24 |

PAGE

SUPPORTING ARGUMENTS:

POINT I.—This court should determine whether perjury may be charged for an alleged untruthful statement as to the availability of a witness made in an affidavit in support of a motion for a new trial where absent the statement and the fact, the applicant for a new trial would be entitled to relief ..... 25

POINT II.—The courts below erred in attributing perjury to a statement which purports to summarize or characterize the statement of another where that statement is attached and subject to be examined and independently evaluated ..... 34

POINT III.—This court should settle and determine the circumstances and conditions, if any, where it is proper to incorporate in an indictment recitals of a previous criminal offense ..... 37

POINT IV.—This court should determine whether it is proper to join in one indictment defendants whose interests and testimony are in conflict in the absence of any charge of conspiracy, aiding and abetting on plot; and whether where prejudice from joinder far outweighs considerations of alleged convenience to the government from such joinder. ..... 42

POINT V.—This court should determine whether a trial judge may ignore judicial admissions—statements of position by the parties—having a direct bearing on the issues as presented to the judge on the motion for a new trial..... 45

CONCLUSION ..... 47

## INDEX TO APPENDIX

PAGE

Excerpts From Government's Exhibit 18 (Petitioner's Affidavit in Support of Motion) ..... 1a

Affidavit of Co-defendant Jones (Submitted With Government's Exhibit 18) ..... 18a

Excerpts From Affidavit in Opposition to Motion (Mittelman's Exhibit B) ..... 23a

Excerpts From Trial Judge's Comments on Newly Discovered Evidence as Basis of Motion (S. M. pp. 467, et seq.) ..... 27a

---

## TABLE OF CASES

U. S. v. Bozza, 365 F. 2d 206 ..... 39

U. S. v. Crosby, et al., 294 F. 2d 928 (2d Cir.) ..... 6, 9

P. S. v. Laut, 17 FRD 31 (S. D. N. Y.) ..... 33

U. S. v. Luzzi, 170 F. Sup. 81 (E. D. Pa.) ..... 31

U. S. v. Verra, 203 F. Supp. 87 (S. D. N. Y.) ..... 37, 38

Levin v. Katzenbach, 363 F. 2d 287 (C. C. A. D. C.) ..... 24, 25, 28

C. C. Cooke, 10 LCM 88 ..... 36

Lorenzo C. Dilks, 14 BTA 1294 ..... 36

---

## RULES CITED

Rule 8(b) ..... 43

Rule 14 ..... 43

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

---

LEO B. MITTELMAN,

*Petitioner,*

*against*

UNITED STATES OF AMERICA.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

To the Chief Justice and the
Associate Justice of the
Supreme Court of the United States

Petitioner respectfully requests this Court to issue a Writ of Certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed petitioner's conviction under 18 U. S. C. Sec. 1621.

### The Opinion Below

The Court of Appeals' opinion is reported at 374 F. 2d 414. There was no opinion on its denial of petition for rehearing. There was no opinion in the District Court. A copy of the opinion is annexed to application of co-defendant Jones, marked Ex. A.

## The Grounds of Jurisdiction

(a) The judgment sought to be reviewed was dated and entered March 14, 1967.

(b) Timely petition for rehearing was filed and denied on April 7, 1967.

(c) Extension of time to file this petition was extended by Mr. Justice Harlan to June 6, 1967.

(d) Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

## Questions Presented

1. Whether the decision in the instant case holding it to be a material fact that an accused has allegedly failed to call a witness whose testimony was suppressed by the prosecution is in conflict with the decision of the Court of Appeals for the District of Columbia in *Levin* v. *Katzenbach*, 363 F. 2d 287.

2. Whether on a motion for a new trial based in part on suppression of evidence favorable to an accused, an accused forfeits his rights for failure to call an available witness who is a named co-conspirator, who is under subpoena by the government and not called by it, who has a long criminal record, whose interests might be in conflict with the interests of the accused, and who, in practical effect, is a "captive" of the government.

3. Whether a charge of perjury can stand as a matter of law based on an alleged false statement in an affidavit supporting a motion for a new trial, where the alleged false statement purports to be a summary, interpretation

or characterization of the affidavit of another which is also annexed in full to the moving papers.

4. Whether petitioner's constitutional rights were violated by inclusion in the indictment recitals of the prior conviction from which he had been seeking relief.

5. Whether where so-called ground rules were established for the express purpose of keeping from the jury all knowledge of the prior conviction, said ground rules were violated by the prosecutor and the trial judge to the prejudice of petitioner.

6. Whether petitioner's motion for a severance based on prejudice should have been granted; and in the circumstances where a motion under Rule 14 of the Rules of Criminal Procedure takes precedence over Rule 8 (b).

7. Whether it was proper to join in one indictment two defendants, each of whom had a criminal record with the result that, in practical effect, neither could call the other as a witness; and, particularly where the indictment did not allege conspiracy, plot, scheme, or aiding and abetting.

8. Whether on a motion for a new trial in a criminal case the parties to the controversy submit the case to the qualified tribunal on an agreed upon theory, may a trial judge in subsequent and different criminal proceedings substitute his own subjective and different theory in passing on the materiality of an alleged perjurious statement in the affidavit in support of the said motion for a new trial.

9. We respectively refer the Court to the questions and the supporting arguments presented by co-defendant Paul R. Jones in his companion application for a writ.

## Constitutional Provisions, Statutes and Rules Involved

### United States Constitution

Article I, § 1:

> "All legislative Powers herein granted shall be vested in a Congress of the United States. * * *"

Article I, § 7:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States * * *."

Article I, § 8:

> "The Congress shall have Power * * * To constitute Tribunals inferior to the Supreme Court; * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution, in the Government of the United States, or in any Department * * * thereof."

Fifth Amendment:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * *."

## Statute and Rules Involved

### Title 18, United States Code

§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

### Federal Rules of Criminal Procedure

Rule 8(b):

> "Joinder of Defendants. Two or more defendants may be charged in the same indictment • • • if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. • • •"

Rule 14:

> "Relief from Prejudicial Joinder. If it appears that a defendant • • • is prejudiced by a joinder of offenses or of defendants in an indictment • • • or by such joinder for trial together, the court may • • • grant a severance of defendants or provide whatever other relief justice requires."

Rule 33:

Rule 33. New Trial*

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . .

## Statement of Case

### A. Introductory

The instant indictment in two counts charges perjury in violation of 18 U. S. C. (Sec. 1621). Count 1 involves the defendant Paul R. Jones, and Count 2, petitioner.*

The trial judge imposed a sentence of 18 months pursuant to 18 U. S. C. (Sec. 4208 (a) (2).

Count 2 of the instant indictment, against petitioner charged him with a false statement in an affidavit of May 15, 1962 in support of his motion for a new trial in a previous proceeding entitled *United States* v. *Crosby, et al.*, 294 F. 2d 928 (2d Cir. 1961), cert. denied sub nom. *Mittelman* v. *United States,* 368 U. S. 984 (Feb. 19, 1962).

In the prior proceeding, petitioner was one of twelve persons in an indictment of 50 counts which charged violation of 15 U. S. C. (77e (a) (1), 77e (a)(2) and 77x, and 18 U. S. C. (Secs. 371 and 1341-43 in their dealings with the stockholders of Texas-Adams Oil Company, Inc., a

* Co-defendant Jones has also applied for a writ of certiorari in this case. To avoid repetition, many of the questions and arguments raised by him are not presented by petitioner herein. It is respectfully requested that they be considered with respect to petitioner as though herein urged.

Delaware Corporation (Texas-Adams). The instant perjury case thus had its origins in the *Texas-Adams* case.

In the prior proceeding, petitioner was indicted on all counts but the first. He was convicted only on Counts 2 and 50. Count 2 charged a scheme to defraud by use of the mails in violation of 18 U. S. C. (1341-42). Count 50 charged a conspiracy in violation of 18 U. S. C. (Sec. 371).

Petitioner was given the maximum prison sentence of five years on Count 2, and then an additional maximum prison sentence of five years on Count 50 to run consecutively to the prison sentence imposed on Count 2. The execution of the prison sentence imposed on Count 50 was suspended, and he was placed on probation for that five years, the probation to begin at the end of the prison sentence imposed on Count 2.

After the denial of certiorari by the United States Supreme Court, petitioner made a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, and 28 U. S. C. (Sec. 2255).

Judge MacMahon denied the motion for a new trial, with an endorsement on the moving papers: "The allegations of the moving papers are insufficient particularly in the light of the trial record. Accordingly, the within motion is in all respects denied. So ordered." It is to be noted that petitioner had no hearing even though, as hereafter appears, there were numerous controverted issues of fact.

**B. Events Leading to Indictment**

After Judge MacMahon denied petitioner's motion for a new trial, he appealed. While the appeal was pending a Grand Jury investigation was instituted with regard to alleged perjurious statements contained in the supporting affidavits of petitioner and co-defendant Jones.

Jones was subpoenaed by the Grand Jury. He appeared and testified (JA 35, *et seq.*).* Apprised of the investigation while he was serving his sentence, petitioner requested permission to appear and testify.

Thereafter, petitioner and co-defendant Jones were indicted (JA 2, *et seq.*).

### C. Admissions of Use of Perjury and Suppression: Addressed to Point I

Following the denial of application for a writ of certiorari in the *Texas-Adams* case and while petitioner was in prison serving his sentence, petitioner moved for a new trial pursuant to Rule 33 of the Rules of Criminal Procedure and Sec. 2255 of 28 U. S. C.

The thrust of his motion as set forth in his supporting affidavit was stated as follows:

> "It is my contention on this motion that the government:
>
> (a) knowingly used perjurious testimony as to material issued against me at my trial;
>
> (b) suppressed evidence in its possession favorable to my defense; and
>
> (c) not only used perjured testimony against me and suppressed evidence favorable to me, but also compounded these injuries by making me the butt of a whipsaw technique, which consisted of the introduction of conflicting testimony and then the assumption of a self-righteous position that it was presenting the whole story." (Govt. Ex. 18, p. 2)

---

* References preceded by "JA" refer to the joint appendix in Court of Appeals; "GA" to government appendix in Court of Appeals; "TR" to stenographer's transcript in Trial Court; "APP" refers to the appendix to this application.

The Court of Appeals in the *Texas-Adams* case said with respect to petitioner's brief "that some apparently damaging testimony has been convincingly explained away" (by Mittelman) 294 F. 2d at 938. But just before that the Court said:

> "Any conclusion of Mittelman's innocence must rest upon the hypothesis that Holland and Carroll, the moving parties in Homestead Oil & Uranium, plus Kimmes, a Denver broker and co-conspirator, perjured themselves; that Harrison Miller, a New York broker, was mistaken as to dates when he testified that Mittelman vouched for Jannis in mid-November of 1955; that Purcell, an experienced securities attorney, was mistaken in his testimony concerning Mittelman and the Empire transaction; and that Mittelman was unbelievably hornswoggled by McCarthy due to an incredible naivete on the part of an experienced attorney."

Petitioner's supporting affidavit spelled out in specific detail the perjuries of Carroll and Holland, and met the other doubts voiced by the court.

(Government Ex. 18 and Mittelman Ex. B were not printed for use in the court below. Extensive excerpts have been printed in the appendix submitted with this application. References to the facts in those excerpts are preceded by "App.").

Petitioner spelled out, too, the concessions by the prosecution that Carroll and Holland had indeed lied with respect to matters vital to petitioners' defense.

Petitioner spelled out, too, the failure of the prosecutor to disavow the perjuries.

Petitioner spelled out, too, the evidence which was suppressed.

Petitioner spelled out too, the prejudice which resulted from the perjuries, the suppressed evidence and the failure to disavow the perjuries.

Petitioner did not indulge in generalities. He was specific in his proofs.

Yet he was denied a hearing.

## The Perjuries of Carroll

The perjuries of Carroll are set forth in paragraphs 18, 19, 20, 21 (APP. 6a, 7a,) and 26, 27 (APP. 8a, 9a). The reasons why the lies seriously prejudiced petitioner are explained in the introductory paragraphs 12-17 (APP. 1a-4a).

A brief resumé is in order. The Texas-Adams take over by certain of the defendant's in that case was claimed to be fraudulent. It was not charged that petitioner was involved in the take over scheme (APP. 2a, ¶13). But it was charged that he joined the conspiracy after the take over to hide prior derelictions involving a company later merged with Texas-Adams, Homestead Oil and Uranium Company with which the witness Carroll was associated as promoter and broker (App. 2a, ¶13).

Carroll's testimony placed petitioner in the middle of negotiations involving Texas-Adams and Homestead (APP. 4a, ¶19). If true, the government's theory of motive and prior association with Texas-Adams would possibly have been established.

But the government knew this testimony was false.

In his affidavit in support of his motion petitioner set forth his proofs that the government deliberately elicited false testimony and failed to disavow it. The proof was a

concession by the government that Carroll had lied, and that it knew this to be so. (Paragraphs 22-24 of Ex. 18—APP. 6a and 7a.) Petitioner's affidavit quote verbatim the concessions of perjury as follows:

> "Carroll's testimony that Texas-Adams was mentioned at the July 22 meeting was unquestionably wrong."
>
> "There is, of course, no way of knowing whether Carroll's recollection was in error or whether he wilfully perjured himself."

The government also said that it would have been "grossly improper" to prevent Carroll "from testifying to what was his recollection" and that it "had no choice but to permit Carroll to testify as his recollection dictated".

The numerous perjuries are itemized in ¶19 of the affidavit (APP. 4a, 5a).

### The Perjuries of Holland

Holland's perjuries are set forth in specific detail in petitioner's affidavit (APP. 10a, 11a and 12a). Holland was the president of Homestead Oil and Uranium Co. (APP. 12a). In its opening to the jury in the Texas-Adams case the government said it would prove that petitioner's motive for joining the Texas-Adams conspiracy was to hide his misappropriation of $69,000 of Homestead's money and 1,500,000 shares of its stock and this was Holland's testimony (APP. 11a).

Holland was put on the stand to prove these charges against petitioner. When it became clear that none of this was true, the government's refuge was that it did not press the point in its summation.

But it did not disavow the testimony of Holland. The jury was left to wonder whether the accusations were true or merely forgotten in the mass of detail it was required to study and decide.

In the answering affidavit the government attorney said:

> "Nowhere does he (petitioner) point *out* to a single instance in which the prosecutor made such argument to the jury (Ex. B. p. 5)."

## The Supressed Evidence

Annexed to petitioner's motion papers is the affidavit of co-defendant Paul R. Jones. It is set forth in full in the appendix herewith (APP. 18a-28a).

Jones promoted Homestead Oil and Uranium Co. Carroll was his partner. Jones put up the money. Holland was Jones's front for the sale of stock (APP. 21a, ¶10 *et. seq.*)

Jones was named as a con-conspirator in the Texas-Adams case.

Jones was under government subpoena, and while in New York reported daily to the prosecutors (APP. 21a, ¶10).

Jones advised the prosecutors that if called as a witness he would have to expose the lies told by them regarding petitioner's association with Homestead and Texas-Adams (APP. 21a, ¶10).

Jones was not called by the government as a witness. He was excused by the government and was told he could leave New York (APP. 19a, ¶5).

All of this is set forth in Jones' affidavit in the Appendix (APP. 18a, *et. seq.*).

In his answering affidavit in opposition to petitioner's motion for a new trial, Arnold Enker, government assistant in charge of the matter conceded the above stated facts with regard to Jones. (Excerpts from his affidavit are contained in the Appendix—28a *et seq.*).

A paragraph from his affidavit is to the point.

8. Even assuming that Jones so advised Government counsel before trial, the Government was not obliged to take Jones's word against that of Holland and Carroll. Government counsel were familiar with Jones' extensive criminal record, which includes convictions for first degree murder for which he received a life sentence, wartime violation of the O. P. A. Ration Act, vagrancy, bribery for which he received 3 years in prison and conspiracy to conceal narcotics for which he received 5 years in prison, and had good reason to accept Holland and Carroll's testimony as against that of Jones. Indeed, Mittelman himself in his brief on appeal characterized Jones as "shadowy" (P. 49), an "unscrupulous scoundrel" (P. 52) and "the author of the nefarious Osage Scheme" (P. 52 n. 62). Thus, at best, the issue boiled down to nothing more than a conflict of testimony between two witnesses of unblemished reputation and a convicted murderer, briber and narcotics dealer who had been named in the indictment as a conspirator. The contention that by rejecting Jones' version in favor of Holland and Carroll Government counsel "knowingly used perjurious testimony" is as scandalous as it is absurd (APP. 24a).

But this is the same Mr. Enker who in his brief in the Texas-Adams case had conceded that Carroll and Holland had lied. And if this was so, then Jones, despite his record and reputation, was in this instance telling the truth, and the prosecutors had to know it.

The suppression was deliberate. Jones' testimony would have destroyed the whole theory of motive, and the government would have to tell the jury that it was Jones whose testimony was truthful.

The Court of Appeals in the Texas-Adams case appreciated the prejudicial nature of this testimony but let it stand, it would appear, because it believed that Carroll and Holland had been truthful.

The Government did not call Jones whose testimony would have demolished the Government's structure of motive. It was not a question of not believing or trusting Jones. If Holland and Carroll were liars, as the Government now admits, then the contradictions of Jones were necessarily truthful; and the duty to so advise the jury was clear.

(The facts above set forth are applicable to the argument under Point I.)

**D. The Alleged Perjurious Statement Upon Which Indictment Is Based**

After setting forth the perjuries of Carroll and Holland and the failure of the prosecutor to disavow them, the suppression of favorable evidence and the general unfairness of the trial procedure in the Texas-Adams case, petitioner referred to the contents of the additional affidavits supporting his motion. One of such affidavits is that of co-defendant Jones (APP. 18a-28a). The statement in regard to the Jones affidavit as it was set forth in petitioner's affidavit (Government Ex. 18) (¶52) is as follows:

> "52. *The Jones Affidavit.* I knew Paul R. Jones before the trial. I had met him in the summer of 1955, and I had last seen him in Birmingham on or about August 11, 1955 when I delivered 500,000

shares of Homestead stock to him which he had stated he could sell. I met him again on several occasions during the trial, to which he had been subpoenaed as a witness. I discussed the case with him in a general way, and he told me that he was under instructions to report to the prosecutors at 4:40 P. M. at the end of each court session. He also told me that he expected to be called as a government witness, and that if he was not called and was released from the subpoena no one would be able to locate him. In confess that I could not decide whether to subpoena him or not. I did not have his confidence. *Before I could make up my mind whether to issue a subpoena or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located.* (Italics ours.)

"I always knew that if Jones told the truth, he could prove that Holland, Carroll and his former partner Graham were consummate liars. In a sense, therefore, while I could not know all the facts to which he could give answers, I knew that if he told the truth he could not hurt me.

"I did not know, however, what he later told me when I met him by chance in New York some months ago, that time after time he had demonstrated to the government attorneys that Carroll and Holland had been lying. There can be little doubt that he was not called because his testimony would not have supported Holland and Carroll—indeed would have destroyed them as government witnesses, and because his testimony would not have been consonant with the government's theory of the Homestead evidence.

> "While from a strict and narrow point of view it might be argued that I had an opportunity to call Jones as my witness, it cannot be gainsaid that the government had a duty to give the jury all the true facts after having exposed the jury to false facts. In a very real sense I was trapped by the government's tactics. The government played an unfair game with marked cards and loaded dice. This might pass in a civil suit, but it does not conform to the dignity of these United States.
>
> "I say that Jones testimony would have done much to sway the jury in my favor. Not only that, it would have compelled the trial court, in my opinion, to strike all the prejudicial Homestead testimony upon which the government had relied in connecting me with the Count I wire fraud scheme."

The italicized portion of ¶52 entitled "The Jones Affidavit" is the basis of the perjury charge. It is contended that by this statement petitioner conveyed the idea that Jones was unavailable to be called by him as a witness between the time the government rested its case (May 2, 1960) and the time the defense was to begin (May 5, 1960) when in fact petitioner and others met with Jones on May 4, 1960 at the Hotel Royalton in New York City, and when in fact Jones did not leave New York until May 6, 1960, one day after the general defense began to put in its case (Indictment: JA 2 *et seq.*).

It was also contended that petitioner sought to convey the idea that Jones' testimony was newly discovered testimony.

The trial Judge, who had the duty of determining the question of materiality, indulged in the following specula-

tive gymnastics without a shred of evidence to support him:

> "In fact, Mr. Mittelman and his lawyers played a calculated game of judicial poker. The stakes were high. They conferred about this thing. They decided not to use Jones, for reasons best known to themselves, which are elucidated in the grand jury minutes, and they took a calculated risk and, Mittelman was convicted.
>
> "Then, they go and, of course, according to the evidence here, Mittelman knew all the time about Jones, so in 1960, after he had been convicted, he doesn't make a motion on any theory, whether it is Rule 33, newly-discovered evidence, or whether it is Section 2255. He had in 1960 exactly what he had in 1962, but he sits by and waits because that is part of the poker game.
>
> "Then he goes to the Court of Appeals, and the Court of Appeals affirms, and he is still playing the poker game.
>
> "Then he goes to the Supreme Court, and he is still playing poker, and the Supreme Court denies certiorari.
>
> "Then, after the Supreme Court is all through, and he is all washed up with the appellate review, he decides the time has come to pull out the trump card. I may be mixing up the different games, but Jones is the trump card. Then they make this motion for a new trial, in which they make the most horrendous accusations at the Government and eventually this indictment results" (Tr. 477-78).

The so-called "horrendous" charges, which apparently excited the trial Judge to make his uncalled for accusations

against a responsible and respected member of the bar, Mr. O. John Rogge, were never denied by the government. What the government did was to offer untenable excuses for its conduct.

The trial judge focussed on that portion of petitioner's motion papers which raised the point of newly discovered evidence. But petitioner never contended that all of the evidence he proposed to offer was newly discovered. Indeed it will be recalled that in discussing the Jones evidence he expressly disavowed its character as "newly discovered". But the trial judge centered on general statements in the affidavit and applied them to the Jones affidavit despite petitioner's disclaimer, as indicated in the quoted portion, *supra,* page 16.

The trial Judge's preoccupation with this aspect of the case carried over and influenced the Court of Appeals. His comments were not printed below but appear in the appendix to this application (APP. 27a *et seq.*).

So it must be clear that the thrust of the motion with regard to the proposed Jones testimony was not "newly discovered evidence".

Heading "52" of petitioner's affidavit quoted in full above is a mixture of fact and conclusion. It must be read in its entirety to determine whether petitioner intended to deceive or mislead in his discussion of the proposed Jones evidence. In addition, it must be read together with the Jones affidavit which was annexed to petitioner's motion papers and which appears in the Appendix herewith (APP. 18a *et seq.*).

Even the government recognized the fact that petitioner was not basing the proposed Jones testimony as "newly discovered". In opposing the motion for a new trial,

Mr. Enker, government attorney's wrote (Mittelman Ex. B, p. 7, ¶14):

> "14. Actually Mittelman's own papers concede that the facts of this case do not amount in law to newly discovered evidence. (Mittelman affidavit par. 52 at p. 36). Instead, he rests in the final analysis on the contention that the Government was under a duty to call Jones as its witness. It is respectfully submitted that the Government was under no duty to call as a witnes and vouch for the credibility of a person with such a criminal record who was a participant in the fraud charge in the indictment. This is particularly so here where with respect to the only two matters of which Mittelman complains that were adduced by the Government, Government counsel also adduced the contradicting testimony."

In the final analysis it must be clear that petitioner in ¶52 was giving his interpretation of what Jones would testify to and Jones' statement of his relationship to the prosecutor. Jones stated he was under subpoena for a long time (APP. 192), that he conferred regularly with the prosecutors during the Texas-Adams trial (APP. 19a), that he was finally excused just before the government "rested" (APP. 19a), and that on leaving New York it would not be possible to locate him (APP. 19a).

In his affidavit petitioner attempted to summarize the contents of the Jones affidavit which was set forth in full in the group of supporting affidavits for all to see—and compare (Government Ex. 18).

Assuming that petitioner's summary was inaccurate in some details, it is absurd to assume evil intent to mislead since comparison was available.

These facts are directed to the proposition that perjury cannot be predicated where the statement alleged to be perjurious is an interpretation of the statement of another where that statement is in juxtaposition with the statement alleged to be perjurious.

### E. Facts Relating to Improper References in Indictment to Prior Conviction

The introductory paragraphs of the indictment, 1 through 7, contain the offending material (JA. 2a *et seq.*).

Reference is also made to paragraph 10 of the indictment which incorporates paragraph 52 of petitioner's affidavit in support of his motion for a new trial, and which states that Jones was required to report each day to the "prosecutors' and that petitioner was undecided to call Jones or depend on the "prosecution" to do so (JA. 6a, ¶10).

We argue hereafter that such recitals are fatal to an indictment unless appropriate means are available and used to avoid prejudice and denial of a fair trial.

### F. Facts Relating to Trial Procedure

To avoid possible prejudice to petitioner from the recitals of a prior criminal offense the trial judge suggested that ground rules be adopted to keep these facts from the jury (GA. 1a, 15a, 38a).

In his opening to the jury and in his summation, and the trial judge in his charge to the jury read the following excerpt from petitioner's affidavit which was contained *verbatim* in the indictment:

> "52. The Jones affidavit. I knew Paul R. Jones before the trial. I had met him in the summer of 1955, and I had last seen him in Birmingham on or

about August 11, 1955 when I delivered 500,000 shares of Homestead stock to him which he had stated he could sell. I met him again on several occasions during the trial, to which he had been subpoenaed as a witness. I discussed the case with him in a general way, and he told me that he was under instructions to report to the *prosecutors* at 4:30 P.M. at the end of each court session. He also told me that he expected to be called as a government witness, and that if he was not called and was released from the subpoena no one would be able to locate him. I confess that I could not decide whether to subpoena him or not. I did not have his confidence. Before I could make up my mind whether to issue a subpoena or depend on his being called by the *prosecutor* he was suddenly excused just before the defense was to begin, and he was not to be located." (Emphasis ours.)

We argue hereafter that when this was read to the jury, the jury was apprised of petitioner's prior conviction, particularly when coupled, with other disclosures however cloaked in euphemisms.

In addition the Grand Jury testimony of petitioner was read to the jury (JA 10a, *et seq.*). Such was its nature that the trial judge was compelled to caution the jury not to speculate as to the nature of the prior proceeding—a procedure calculated to cause speculation rather than to stifle it.

The Ground Rules permitted the government to have it both ways, whereas petitioner was effectively shackled from making a defense against certain speculative and subjective issues raised by the prosecution.

The Court of Appeals saw no prejudice because it was its opinion that the evidence of prior criminal conviction

would have been admissible in any event (374 F. 2d at p. 419).

It is our contention that even if, *arguendo,* such evidence would have been admissible, it became non-admissible because of the Ground Rules.

**G. Facts Relating to the Trial Court's Misconception of Materiality Issues.**

The trial judge had to decide the question of whether the statement alleged to be perjurious was in fact material to the issues involved in the Sec. 2255 proceeding. He approached this question with a built in bias against anyone who dared impute to dedicated prosecutors anything but the noblest of motives, intentions and propriety of conduct. Then he opined that petitioner's application of a new trial was the result of a calculated scheme born at the meeting of May 4, 1960, to hold Jones in reserve for the very eventuality of a motion to get a new trial if a conviction resulted and all appeals in ordinary course failed. To this he added his own reading of the motion as one falsely based on newly discovered evidence. He refused to accept petitioner's averment in his affidavit that Jones' evidence could not be deemed newly discovered evidence, nor of the government's concession in opposition to the motion that no such claim was being made. He put it this way:

> "In the instant case the government sought to establish motive and ulterior purpose by contending that Mittelman in his desperation while he was incarcerated dreamt up an attack on our judicial system by a perverted and corrupt use of 28 U. S. C. (2255). The trial judge to use the vernacular, bought the argument. During the trial he said:
>
> 'In fact, Mr. Mittelman and his lawyers played a calculated game of judicial poker. The stakes

were high. They conferred about this thing. They decided not to use Jones, for reasons best known to themselves, which are elucidated in the grand jury minutes, and they took a calculated risk, and Mittelman was convicted.

'Then, they go and, of course, according to the evidence here, Mittelman knew all the time about Jones, so in 1960, after he had been convicted, he doesn't make a motion on any theory, whether it is Rule 33, newly-discovered evidence, or whether it is Section 2255. He had in 1960 exactly what he had in 1962, but he sits by and waits because that is part of the poker game.

'Then he goes to the Court of Appeals, and the Court of Appeals affirms, and he is still playing the poker game.

'Then he goes to the Supreme Court, and he is still playing poker, and the Supreme Court denies certiorari.

'Then, after the Supreme Court is all through, and he is all washed up with the appellate review, he decides the time has come to pull out the trump card. I may be mixing up the different games, but Jones is the trump card. Then they make this motion for a new trial, in which they make the most horrendous accusations at the Government, and eventually this indictment results'." (TR. 477-78)

There is not a shred of evidence to support this charge. Indeed it will be recalled that in discussing the Jones affidavit and his proposed evidence, that petitioner conceded the availability of Jones, and that in his appeals in the *Texas-Adams* case he attacked the knowing use of

perjured testimony against him. He did not "dream up" these accusations as afterthoughts. But the trial judge, creating and believing this, went awry on the question of materiality, motive and intent.

### H. Facts Relating to Severance and Prejudicial Joinder

We refer the Court to the statement of the case on this issue as argued by co-defendant Jones.

We approach the problem somewhat differently by arguing that joinder made confrontation impossible, and that the Government and Grand Jury knew it. This was true as a practical matter because of the prior criminal records of both defendants.

## Reasons for Allowing Writ

1. The Court below has decided important questions of Federal criminal law in conflict with principles set forth in *Levin* v. *Katzenbach* decided recently by the Court of Appeals for the District of Columbia, 363 F. 2d 287. The question involves the extent of the duty imposed on a defendant on a motion for a new trial to overcome the knowing use of perjurious testimony by the prosecution and the suppression of favorable testimony.

2. The Court below erred in holding that perjury may be upheld on basis of an alleged false statement based on interpretation or characterization of the statement of another even where the statement relied on is fully set forth so that it might be compared.

3. The Court below has decided an important question of Federal criminal law which has not been previously passed on by this Court by its ruling that recitals in an indictment of a prior criminal conviction are not preju-

dicial under proper admonitions to the jury even where Ground Rules providing for avoidance of disclosure are violated by the prosecutor and the trial judge.

4. The Court below erred and denied petitioner his right to a fair trial, by giving precedence to Rule 8(b) of the Rules of Criminal Procedure providing for joinder of defendants over Rule 14 providing for severance where prejudice is obvious.

5. The Courts below erred when they failed to accept as judicial admissions the agreed theory on which a motion for a new trial was presented to the appropriate and original tribunal which decided the issue as so presented.

6. For the reasons and arguments set forth in the application for a writ by co-defendant Jones previously filed herein.

## *SUPPORTING ARGUMENTS*

## POINT I

**This court should determine whether perjury may be charged for an alleged untruthful statement as to the availability of a witness made in an affidavit in support of a motion for a new trial where absent the statement and the fact, the applicant for a new trial would be entitled to relief.**

It would be an effort of supererogation to discuss the long line of cases in which this court has defined the duty of prosecutors in criminal cases. These decisions sternly warn of the consequences of such derelictions as suppression of evidence and use of perjury to secure convictions.

However, a discussion of the case of *Levin* v. *Katzenbach* (363 F. 2d 287) is particularly applicable and instructive.

By a divided court it was held that even where a witness was equally available to the defense, the failure of the prosecutor to call the witness whose testimony MIGHT be favorable to the accused, or possibly raise a reasonable doubt a remand would be required.

Judge Bigelow, writing for the majority stated the general principles involved:

> "Relief would be available, of course, had the government deliberately presented a false picture of the facts, either by knowingly using perjured testimony, failing to correct testimony when it became apparent that it was false, or actively suppressing evidence known to be exculpatory. But appellant urges on this appeal that the court below erred when it limited itself to findings on the question of deliberate suppression. He argues that his rights were violated if the government negligently failed to disclose that neither McCeney nor Hooper remembered exchanging the $1,000 bills for twenties.
>
> • • •
>
> "A number of circuits have recently held that the deception that results from negligent nondisclosure is no less damaging than that which is a product of guile and that such nondisclosure entitles the defendant to relief. We find the reasoning of such cases persuasive and essential to the fair administration of criminal justice especially in view of the disadvantages facing the accused in the trial process. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).
>
> • • •

"Thus appellant would be entitled to relief in the present case if the government failed to disclose evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt. Such a failure may be classified as negligence. The necessary findings on this issue were not made below.

"Requiring government disclosure will not encourage defense counsel to be careless in trial preparation since there can be no assurance that the government, even with all its resources, will discover all significant evidence favorable to the defense. And we do not suggest that the government is required to search for evidence favorable to the accused, or to disclose all its evidence, however insignificant, to the defense.

"The government contends that, since the fact that McCeney and Hooper did not remember the exchange could have been discovered by appellant, the government's failure to disclose it did not violate appellant's rights. Ordinarily, a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of newly discovered evidence. But appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner.'"

In his dissenting opinion Judge Berger had this to say:

> "Presentation of perjured testimony and deliberate suppression of evidence are types of conduct which not only prejudice the defendant but also violate the law, the basic duty of the prosecutor as an officer of the Court, and the very integrity of the judicial process. Such conduct is impermissible. As a result, a showing that the prosecution knowingly suppressed relevant exculpatory evidence automatically entitles the defendant to a new trial, with little or no showing of prejudice.
>
> On the other hand, precisely because a trial is not to be a 'game of wits', the law has always required a showing of due diligence as the precondition to gaining a new trial upon the discovery of any new and relevant evidence which was not within the exclusive control of the prosecution. In short a litigant is not allowed to gain an advantage out of his own slovenly preparation for trial."

The point of difference and departure between the majority and Judge Berger is the question of diligence in preparation. And it is this emphasis that brings the instant case within the sweep of the views of the majority and Judge Berger in the *Levin* case.

It is true that Jones was present in New York, and a subpoena could have been served on him. He was interviewed by the defense and a decision was made not to call him.

But the circumstances justified the decision, and takes the case out of the area complained of by Judge Berger.

In the *Levin* case the witness who was not called had no axe to grind. He was unconcerned in a very real sense.

He had no stake in the outcome. Under no circumstances could his objectivity be open to question. His memory might be faulty. No significance could be attached to that. His recollection could even be contrary to the actual facts. That would be put down to human frailty.

Consider on the other hand the dilemma of the defense.

1. Jones a co-conspirator.
2. Jones a many times convicted criminal.
3. Jones under government subpoena.
4. Jones a "prisoner" of the prosecution.

Could Jones' apparent willingness to testify be trusted?

Granted that a calculated decision was made not to call him, was not the defense justified in relying on the undoubted duty of the prosecution to call him?

The dissent in *Levin* did not question the underlying principles of prosecutional duty. It raised the spectre of uncertain results bottomed on negligent or inefficient counsel for defense.

While Jones was a co-conspirator, a convicted criminal, under government subpoena and in danger of reprisal as "non-cooperative", he was in practical effect unavailable as a witness for whom defense dared to vouch.

It was different with the government. It had the power and the duty to secure the truth from him.

It is clear, is it not, that petitioner on the facts presented by him was entitled to a new trial. Applying the *Levin* principle, it was not material that a witness known to the prosecutor and not used by him to give evidence of possible favor to the defense was equally available to the

defense. Does it not follow that "availability" is not the controlling factor?

It was the theory of the trial judge in this perjury case, echoed by the Court of Appeals that it was crucial to the success of the motion for a new trial that the defense show diligence in securing the evidence now stated to be "newly discovered". The Court of Appeals said:

> "Mittelman contends further that even if the statements be found untrue as used, they were not material to the proceeding in which they were used, his application for new trial. Materiality of the statements was correctly held to be an issue for the court, which held them material. *United States* v. *Siegel,* 263 F. 2d 530, 533 (2d Cir.), cert. denied 359 U. S. 1012 (1959). The claim that they were erroneously held material must be rejected. Even if, as is now claimed, the main thrust of the motion was not newly discovered evidence that Jones would contradict government witnesses Carroll and Holland, but that Jones would testify that he had informed the government of the claimed falsity of Holland's and Carroll's testimony and the government had used it regardless and that Jones had not revealed this to Mittelman until after the trial, the statements would still be material. The court before which the motion was pending would be interested in knowing not only whether Jones had told those details to Mittelman, but whether he was available, whether he talked at all to Mittelman, when and to what extent, so that not only the truth of the statements could be tested, but also Mittelman's diligence in inquiring. Diligence is material on any claim of newly discovered evidence. *United States* v. *Pellegrino,* 273 F. 2d 570 (2d Cir. 1960); *United States*

> v. *Costello,* 255 F. 2d 876, 879 (2d Cir.), cert. denied 357 U. S. 937 (1958); *United States* v. *Abrams,* 357 F. 2d 539, 550 (2d Cir.); cert. denied 384 U. S. 1001 (1960)."

The fact is that petitioner made no averment that he was unaware of Jones. He expressly stated that he met Jones several times during the trial and did not doubt that if he told the truth his evidence would be helpful.

His contention was, when properly defined, that the prosecutor had failed in his duty to call Jones.

The trial judge persisted in arguing to his own satisfaction that petitioner was attempting to claim Jones as "newly discovered". This point will be discussed further under another point of the argument. All that petitioner stated to be newly discovered was Jones' post trial statement that he had on many occasions advised the prosecutor of the lies of Carroll and Holland. A buttressing factor to the previous admissions of the government in its brief in the court of appeals in the Texas-Adams case.

Assuming, *arguendo,* that the statement of Jones' dismissal before the defense began was false, was it material in the context of this case?

Not every falsehood constitutes perjury.

> "The case of United States v. Luzzi, 170 F. Supp. 81 (E. D. Pa. 1959) is in point. There the defendant was convicted of robbery and sentenced to prison for a term of 7½ to 20 years. Having exhausted his state court remedies he filed a petition for habeas corpus in the federal court, averring that his constitutional rights had been violated in his trial. As a result of his testimony in the habeas corpus hearing he was

charged and tried in the federal court for perjury. He was charged with having testified falsely in saying that he personally rather than his counsel asked the questions of the prospective jurors at the time of the robbery trial. There was abundant evidence in the perjury trial to the effect that defendant's statement in the habeas corpus hearing was false when he testified that he personally rather than his counsel asked the questions of prospective jurors. The question before the federal court was whether such testimony was material to any of the issues in the habeas corpus proceeding. In holding that this testimony was not material and therefore could not form the basis for a perjury prosecution under section 1621, the court reasoned:

> 'In the Berks County case defendant was charged with having robbed a garage. At the trial a relative of the garage owner was a member of the jury which convicted defendant. In the habeas corpus case it was defendants' contention that the fact that this interested juror sat in judgment in his case deprived him of his constitutional rights. There was no contention * * * however, that defendant either by himself or through his counsel, was in any way deprived of his right to examine prospective jurors or that there was any interference with his right to examine them. In view of this, it is apparent that whether or not defendant personally asked the questions of the prospective jurors * * * was a question which was immaterial to the issue in the habeas corpus case.' '' At 82.

Also in point is *United States* v. *Laut*, 17 F. R. D. 31 (S. D. N. Y. 1955), where Judge Bicks held that a count which charged in effect that the defendant had falsely stated, in 1961, that all statements he had made at a naturalization hearing in 1950 were true, was insufficient. Judge Bicks held and said:

> "Beyond doubt, Count Two charges no probably material false statement. Alleged only is that defendant in 1951 knowingly lied about the truth of any of his 1950 statements. Since many of defendant's 1950 answers were not then material, lying about the truth of any one of them one year later, during rehearing of the same issue, must likewise be immaterial. * * *" At 35.

The court of appeals concentrated its attention on whether or not petitioner had shown himself diligent in chasing down Jones as a possible witness. It held that the question of whether or not the statement was perjurious was related to the effect on Judge MacMahon.

Again, and we repeat, petitioner's affidavit disclosed his prior talks with Jones and the reason he was undecided whether to call him as a witness.

We suggest that on the facts in the instant case, Judge Berger would agree that "diligence and slovenly preparation was not involved; that what was involved was the integrity and dignity of the United States.

In any event this case calls for a resolution of the conflict in the decisions of two circuit courts.

## POINT II

**The courts below erred in attributing perjury to a statement which purports to summarize or characterize the statement of another where that statement is attached and subject to be examined and independently evaluated.**

In his affidavit in support of his motion, petitioner attempted to summarize and characterize the affidavits of four prospective witnesses who would testify in the event petitioner was given a hearing on the issues raised by his motion.

Subdivision 52 pertained to the Jones affidavit. "The Jones affidavit".

Subdivision 53 pertained to the Jannis affidavit "The Jannis affidavit".

Subdivision 54 pertained to the affidavit of Purcell "The Purcell Affidavit".

Subdivision 55 pertained to the Reed affidavit "The Reed affidavit".

All of these affidavits were attached to the motion papers for a new trial (Gov. Ex. 18).

Co-defendant Jones told a story in his affidavit, the essential details of which were never contradicted or denied by the government. The essentials were that he could prove that Carroll and Holland had lied, and that the government elected to stand by perjury rather than truth —depending on the source and its purpose.

Perjury is attributed to petitioner on the assumption that he had decided to call Jones as a witness, but could not locate him. Passing his grand jury testimony which ex-

plained why he and his associates decided not to call Jones, it is obvious that he never asserted he would call Jones even if he was available.

If we assume for a moment that petitioner had not done more than identify the persons whose names were signed to the supporting affidavits, it is clear that no perjury could have been charged against petitioner. And even Jones' affidavit would have gone unchallenged because all that he said was that he was excused just before the government "rested," an indefinite and vague time because the governmnet "rested" after the defense completed its presentation. It was only by attributing to Jones the interpretation put on his affidavit by petitioner that Jones' affidavit was held to be misleading.

By nit-picking, inference, strained construction and desire to achieve a result is it possible to attribute to petitioner an intent to deceive?

The complete answer is that it was left to Judge MacMahon to read Jones' affidavit and what petitioner said about it.

We have not been able to find a case dealing directly with the question herein raised. There is, however, a line of cases involving tax returns which are applicable. A taxpayer taking a deduction not allowable is not guilty of fraud or perjury if he sets forth so that all may see and read the source of the income or reason for deduction. He may claim a capital gain which is in fact normal income, and he cannot be charged with fraud or perjury if the facts on which he relies are exposed for examination. It is different if he fails to disclose the source of the income so that an examiner may be misled.

In *Lorenzo C. Dilks,* 14 BTA 1294, 1301 it was said:

> "As indicated above, at the time he filed his return for the year 1921 petitioner made a disclosure of the fact that he had received $74,703.94, which he was not returning as income, claiming the same to have been paid him as a gratuity. Though we have held him to be in error in his characterization and treatment of the sum so received, we are of the opinion that the respondent, on whom rested the burden of proof on this issue, has not established fraud. The disclosure, in our judgment, negatives any intention on the part of the petitioner to file a false and fraudulent return with intent to evade tax and, on the contrary, evidences an honesty of belief that the sum received was not taxable. The charge of fraud is disapproved.
>
> *Judgment will be entered under Rule 50."*

In C. C. Cooke, 10 T. C. M. 881, 906 (1950 aff'd 203 F. 2d 258, it was said:

> "• • • The fraud meant is actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing. • • • " [*Mitchell* v. *Commissioner,* 118 Fed. (2d) 308 [41-1 USTC ¶ 9317].]
>
> "*William W. Kellett,* 5 T. C. 608, 618 [Dec. 14,712].

The failure of petitioner to prove before the Court the existence of a real profit sharing plan and partnership for tax purposes does not require a finding of fraud. More than doubt is required of respondent under the burden he had. *Arthur M. Godwin,* 34 B. T. A. 485 [Dec. 9397]. There was no concealment of the profit sharing plan or the formation of a partnership.

All of the credits, together with shares of profits of the partnership, were fully reported for income

tax purposes, and tend to negative a deliberate purpose to evade taxes. *Lorenzo C. Dilks,* 15 B. T. A. 1294 [Dec. 5040]; *George W. Griffiths,* 37 B. T. A. 314 [Dec. 9949]."

Perjury and fraud are not far apart in concept.

It is difficult to see how either can be found in the face of full disclosure.

## POINT III

**This court should settle and determine the circumstances and conditions, if any, where it is proper to incorporate in an indictment recitals of a previous criminal offense.**

In the case of *United States* v. *Verra,* 203 F. Supp. 87 (S. D. N. Y. 1, 2), Judge Weinfeld said in regard to reference of a prior conviction in an indictment:

> "John Verra's conviction, if permitted to remain in the indictment, could not properly be brought to the jury's attention at the start of the trial, and if the prosecution, in his opening statement to the jury, were read or refer to this allegation, a mistrial would result."

In the instant case no motion to strike was made. It was agreed instead to avoid all references to the prior conviction or the nature of the prior proceeding. But the prosecutor in his opening statement and summation did the very thing Judge Weinfeld said would lead to a mistrial. *Such a motion was made and denied.*

Judge Weinfeld went on to speculate as to other consequences that would result from such disclosure. He said at pp. 89-90:

> "Nor could the conviction against John Verra be established in the Government's direct case. If the jury were to request the indictment during its deliberations, these allegations would have to be excised—certainly if he did not take the stand. It is no answer, as the Government suggests, that the matter be left to the trial judge 'and should he decide at the conclusion of the trial that these allegations should not be submitted to the jury, they may be blocked out.' While it is true that surplusage in an indictment may disregard, the inclusion of the questioned allegations serves no purpose other than possible prejudice to the defendants. An indictment should contain a 'plain, concise and definite written statement of the essential facts constituting the offense charged.' Since the defendant's conviction, sentence and appeal in the earlier case are not essential facts of the crime charged in the current indictment and prejudice may inhere in the allegations, the motion under Rule 7 (d) to strike paragraphs 3H, 3I, 3J and 3K from the indictment is granted." At 89-90.

It is in the very nature of a criminal trial that the indictment comes before the jury. A question arises whether in a perjury case growing out of a prior criminal proceeding it is necessary to so recite the facts that the conviction in the prior case is brought to the attention of the jury.

The very fact that deletions, evasions and euphemisms were resorted to proves that careful draftsmanship could

have avoided the prejudices. The contrivances used to secrete the facts from the jury merely aggravated the situation.

The built-in prejudice could not be overcome by any device, as the trial itself demonstrated. The indictment should have been dismissed.

Nor could the so-called ground rules cure the fatal situation. They were broken, perhaps it was inevitable that this should be so. But petitioner did not create the situation. The situation was created by an indictment inherently and inevitably prejudicial.

The court below commended the trial court for its effort to avoid the prejudice. These efforts failed and merely aggravated the situation.

Nor did the caveats of the Trial Judge to avoid speculation help matters. It is now well understood that such warnings go disregarded. The invitation to speculation was too titillating an exercise.

The Court of Appeals missed the point. The Ground rules were justified as a barrier to prejudice only if observed by the parties and the trial judge. It has no answer that the trial judge continually warned the jury to avoid speculating as to the secret from which it was excluded. It is naive to suppose that the jury would not speculate and would not suspect the truth. The caveat merely served to spice the speculation.

> In *United States* v. *Bozza*, 365 F. 2d 206, 214-218, defendant Jones had given a confession as to the burglaries in question, in which he had named the other appellants as accomplices. The Trial Judge had deleted the names of the other appellants from the confession before receiving it into evidence. In

addition, he had cautioned the Jury to consider the confession only as against the confessor Jones, and not to speculate as to whose names had been deleted. In reversing, because of the failure to grant a severance to each of the appellants when receiving the confession of the defendant Jones, Judge Friendly wrote:

"We do not read Delli Paoli as going so far. Page 216.

"Although in a sense the confession in both cases merely corroborated what the Government had already had established, 352 U. S. at 242, the similarity is more formal than real. Whereas the admission in Delli Paoli was hardly critical to a case already made out by testimony of outside observers, Jones' confession furnished a devastating corroboration of the heavily attacked testimony of an accomplice on which the prosecution almost entirely depended for proof of guilt. This admission by a defendant that Kuhle had worked with him and all the others probably ended whatever chance any of them might have had to find a juror unconvinced of a guilt beyond a reasonable doubt. Indeed, even if the Jury could perform the feat of not speculating over the inserted blanks, Jones' confession of his own association with Kuhle would have a serious spillover effect at least on Mulhearn and Fizzo * * * we therefore cannot regard Delli Paoli as controlling in the Government's favor." Pages 216, 217.

In addition, the violation of the ground rules gave the prosecution the advantage of having its cake and the relish

of eating it. Far better for petitioner had he been able to open wide the gates of evidence. He could have shown

(a) The perjuries used against him in extenuation of his alleged guilt.

(b) That he was incarcerated when he executed his affidavit and under great stress.

(c) That the events referred to covered a relatively remote period, and occurred during the course of a lengthy and complicated trial.

(d) That the decision not to use Jones as a witness was a decision made by experienced counsel for himself and others.

(e) That it was absurd to believe he would deliberately lie about a matter known to so many.

(f) The reasons for not calling Jones in his own defense.

(g) The whole of his affidavit could have been read to the jury without suspicious appearing deletions.

(h) The whole of his grand jury testimony could have been read to the jury with its exculpatory explanations.

In addition, and most important, he could have taken the stand in his own defense because it would already have been known to the jury that Jones and he had criminal records; and that his record was bound to the case being judged by it.

The inherent defects of the indictment were not saved by the ground rules.

## POINT IV

**This court should determine whether it is proper to join in one indictment defendants whose interests and testimony are in conflict in the absence of any charge of conspiracy, aiding and abetting on plot; and whether where prejudice from joinder far outweighs considerations of alleged convenience to the government from such joinder.**

A. When the so-called ground rules were suggested by the trial judge it was not yet known whether the government intended to offer in evidence the transcripts of the grand jury testimony given by petitioner and co-defendant Jones. Access to the Grand Jury testimony was denied despite new Rule 16 (a) as amended CR. 729-731). Petitioner's attorney was unaware of their contents when he reluctantly agreed to the ground rules suggested by the trial judge.

In advance of trial there was sufficient indication of possible conflict as to suggest a motion for severance. This was denied.

But the prosecutor knew that there was a conflict in interest and testimony between petitioner and co-defendant Jones. He must have known that he was gaining an advantage by the agreement if he could get the Grand Jury testimony before the jury. It is our position that it was his duty to disclose to the trial judge and to defense counsel the existence of this conflict the better for them to decide whether the ground rules would secure to petitioner the noble objective desired by the trial judge.

The Government was unfair, with the knowledge it had of the conflict, in effecting the joinder in the indictment, and it aggravated the unfairness by failing to disclose the

trap into which defense counsel fell by agreeing to the ground rules, albeit with misgivings.

A comparison of the grand jury testimony of each defendant discloses the conflict which shoudl have compelled a severance after it was received in evidence. This conflict appears at in the appellant's joint appendix in the Court of Appeals.

To avoid repetition of argument, we respectfully refer this court to Point V of petitioner Jones' application herein for a writ of certiorari heretofore filed in this court.

B. Recognizing that rule 8 (b) of the rules of criminal procedure permits joinder to serve the convenience of the trial court and the parties, it is equally true that rule 14 recognizes the possibility of prejudice in such joinder. The resolution of this problem requires the exercise of discretion and the possibility of abuse.

We take it that where prejudice outweighs convenience, convenience must give way. Each case presents its own special problem. It is our contention that in this case the prejudice was so clear as to require severance.

The law is clear that he who claims prejudice bears the burden of setting forth the prejudicial facts.

1. Convenience is served in a complicated and long case. This case was tried in 3 days with most of the time taken up in colloquy.

2. Convenience is served when a conspiracy is charged involving numerous defendants. In this case the indictment did not charge a conspiracy, plot, scheme or aiding and abetting. There were but two defendants.

3. Convenience is served where the evidence as to each defendant is unchallenged as to each and by each.

4. Prejudice is clear where an accused by reason of joinder loses a right to cross examine a witness. In this case it was impossible for petitioner to call his co-defendant as a witness for any purpose, even if only to introduce him to the jury.

5. Prejudice from joinder is apparent if it puts the defendants in opposition to each other. In the instant case co-defendant Jones has accused petitioner of confessing him into a guilty situation. There was also much conflict in the matter of detail which created a background of intrigue based on speculation.

6. Prejudice from joinder was inherent in the inability of either defendant calling the other without compelling the relevation of prior criminal convictions, precluding clarification of explicable differences.

7. Prejudice was clear in the frustration of showing through Jones suppression of evidence and his dismissal by the prosecution as a witness.

Co-defendant Jones has added his voice to this argument from a point of view somewhat differently, but in our opinion, most cogently. We adopt his reasoning and arguments and respectfully refer the court to his application for further support of this argument.

## POINT V

**This court should determine whether a trial judge may ignore judicial admissions—statements of position by the parties—having a direct bearing on the issues as presented to the judge on the motion for a new trial.**

It is to be observed that the Court of Appeals found the offending sentence material because it would prompt the judge who heard the motion to inquire whether petitioner had been "diligent" in discovering the Jones evidence, thus invoking the rule generally applicable to newly discovered evidence. We discussed this question from a different point of view under a previous Point.

As to the Jones evidence as shown above, petitioner made no claim that it was newly discovered. He expressly stated that it did not meet the generally accepted standards applicable to newly discovered evidence.

And the government in its answering affidavit accepted this concession.

We quote again from the Government's answering papers:

> "14. Actually Mittelman's own papers concede that the facts of this case do not amount in law to newly discovered evidence. (Mittelman affidavit par. 52 at p. 36). Instead, he rests in the final analysis on the contention that the Government was under a duty to call Jones as its witness. It is respectfully submitted that the Government was under no duty to call as a witness and vouch for the credibility of a person with such a criminal record who was a participant in the fraud charge in the indictment. This is particularly so here, where with respect to

> the only two matters of which Mittelman complains that were adduced by the Government, Government counsel also adduced the contradicting testimony."

The trial judge refused to be bound by the issue as submitted by the parties. Despite petitioner's concession that Jones had been available, he insisted that the motion was instinct with the assertion of submission on the exclusive theory of newly discovered evidence.

His remarks in this connection appear at p. 467 *et seq.* of the transcript. Since the transcript was not printed, these remarks appear in the appendix hereto (APP 27a *et seq.*).

It is our position that trial court and the Court of Appeals erred in employing the standards of newly discovered evidence in order to find that the pertinent sentence, out of the context of the whole and the thrust of the motion, was "material".

In *U. S.* v. *Roy Fruehauf, et al.,* Judge Sugarman held in an unreported decision that the government was bound by its assertion that a particular transaction, asserted to be criminal, was a "loan" and as such violated the law respecting transactions between labor leaders and employers having dealings with their unions. He dismissed an indictment on that ground. The U. S. Supreme Court reversed holding that the word "loan" did not necessarily prevent the government from showing that though a "loan" in fact, the terms could be such as to make it partake of aspects of a gift—a fact that had to be tried.

However, there was no criticism of the legal proposition that a straight forward stand constituted a judicial admission and would be binding unless, of course, not a clear statement of position.

But in the instant situation it is clear that both parties agreed that the Jones evidence was not "newly discovered" as a legal fact.

The consequence of this disregard of the agreed theory on which the matter was presented to Judge MacMahon, and upon which his denial of the motion was based—right or wrong—was a forced and ill-founded determination of motive and intent, and, therefore, an improper finding of materiality.

It must finally be emphasized that the jury did not pass and had no opportunity to pass on the question of materiality. The trial judge made the finding, and it is our contention that he erred, and that the court below committed error in sustaining this finding.

## CONCLUSION

**This court should grant certiorari, the judgment below should be reversed, and the indictment dismissed.**

Respectfully submitted,

Leo B. Mittelman,
*Pro se,*
124 East 30th Street,
New York, N. Y. 10016.
MU 9-1114